

Office Supreme Court, U.
FILED

FEB 17 1919

JAMES D. MAHER,
CLERK

19
No. 891.

In the
Supreme Court of the United States.
October Term, 1918.

THE UNITED STATES OF AMERICA, - Petitioner,
VERSUS
SUDA REYNOLDS, - - - - - Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

MARK GOODE,
HAL JOHNSON,
JESSE D. LYDICK,
Solicitors for Respondent.

INDEX.

	Page.
STATEMENT OF THE ISSUES	1
ARGUMENT	3
The decision of the Department being that the trust period extends for twenty-five years from the date of the certificate of allotment (trust patent), the same will be followed unless clearly erroneous	3
The trust period extends for twenty-five years from the certificate of allotment (trust patent) and until by execution of final patent the legal title in fee simple is vested in the Indian allottee or his heirs	13
The Acts of Congress creating trust periods in like cases of conversion of Indian tribal lands into individual estates makes the period run from the date of certificate of allotment (trust patent) and not from the approval of the schedule of allotments. Unless the language in this act forbids a like construction the same period would be intended	18
The President has the right to extend the trust period at any time until the United States has surrendered its trust by conveying the absolute fee simple title to the Indian allottee or to his heirs	19
The executive order extending the time of the trust was definite and in accordance with the Act of Congress	22
The order does not suspend the Act of Congress permitting sales before the expiration of the trust period upon the approval of the Secretary of the Interior	22
CONCLUSION	31

AUTHORITIES CITED:

Proclamation of the President (27 Stat. 980-2)	4, 15
Letter of Commissioner Browning to the President	5
Reply of Secretary of State with endorsement of the President	7
Order of President Roosevelt extending trust period	9
Opinion of Solicitor General in the Klamath case	11
Act of March 3, 1891 (26 Stats. 1019)	13

INDEX—CONTINUED.

	Page.
Act Feb. 8, 1887 (24 Stat. L. 388)	14, 33
Ballinger v. Frost, 216 U. S. 240, 54 L. ed. 464	16, 17
Simmons v. Wagner, 101 U. S. 260, 125 L. ed. 910	17
Wood v. Gleason, 43 Okla. 9, 150 Pac. 418	17
Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 91 Pac. 792	17
Act of June 21, 1906 (34 Stat. L. 326)	23
Order of President Willson of Nov. 24, 1916	24
Proviso in Indian Appropriation Bill of 1894	27
Act of May 31, 1900 (31 Stat. L. 221)	27
Act of May 27, 1902 (32 Stat. L. 245-275)	28
Act of May 6, 1906 (34 Stat. 183)	29
Act of May 29, 1908 (35 Stat. L.)	29
Act of June 25, 1910 (36 Stat. L. 855)	30
Act of May 18, 1916 (38 Stat. L.)	30
Pomeroy's Eq. Jur., Sec. 375	34

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1918.

No. 591.

THE UNITED STATES OF AMERICA, - *Petitioner*,
vs.
SUDA REYNOLDS, - - - - - *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

B R I E F o f R E S P O N D E N T .

We have been furnished with a carbon copy of the petitioner's brief, "subject to change," that it proposes to file in this cause. The statement of the case as made therein appears to be correct, and likewise the issues contested in the case below have been fairly stated with the possible exception that it was earnestly urged on behalf of the respondent that even though the presidential order was made in apt time it had no application to the lands involved in this controversy because they are inherited lands

and are not within the purview of the presidential order. Hence we will omit any further statement of the case.

The petitioner in the copy of the brief furnished us insists upon three points, setting them out in full. They are substantially:

First. The trust begins from the date of the trust patent.

Second. That if the trust does not run from that date the right of the President to extend such trust continues until the United States conveys absolute title to the allottee or his heirs, and that any contract or conveyance made prior to the issuance of final patent is void.

Third. That the statute does not limit the right of the President to extend such trust period to twenty-five years from the date of allotment, and that it exists until the final patent issues.

ARGUMENT :-

In the "Brief of Argument" the petitioner sets out six propositions on which it relies to establish the points insisted upon, and we desire to notice them in their order. But it is proper to say we have only a carbon copy of the brief proposed to be filed "subject to change," and therefore we may not follow petitioner's argument as it is finally made in its printed briefs.

I.

The decision of the Department being that the trust period extends for twenty-five years from the date of the certificate of allotment (trust patent), the same will be followed unless clearly erroneous.

We have no quarrel with this proposition of law. We admit that it is the rule and a sound one, but we are certain that this rule does not apply in this case, because the Executive Department has held both ways, and the great majority of rulings are contrary to the one relied on in this record, and we think that the rule announced by the Circuit Court of Appeals is in harmony with the contemporaneous construction placed upon the act by the Department.

The first construction of the act appears in the proclamation of the President opening the surplus

lands to homestead entry, which is dated September 18, 1891, and reads in part as follows :

*"Whereas, allotments of land in severalty to said Sac and Fox Nations, said Iowa Tribe, said Citizen Band of Pottawatomies, and the said Absentee Shawnee Indians have been made and approved, and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreement with them respectively * * * "* (27 Stat. 980-2.)

This proclamation was prepared, as are all such proclamations, by the Interior Department and by the Indian bureau and the land office thereof. It bears Secretary Noble's signature and is just two days after the approval of the schedule. The President, the Secretary, the Commissioners of both the land office and the Indian bureau, as well as every person connected therewith, well knew that the physical act of preparing the patents and recording the same, had not been done and could not possibly have been done; but they all, in common with every person who has had occasion to come in contact with the matter of allotments, thought that as a matter of law the order approving the allotment schedule and directing the patent to issue was equivalent to the issue; that no matter when actually issued the patent related back to the date of approval, and as a matter of law the trust period began to run from the approval.

Moreover, the Secretary of the Interior has for many years published an annual report which contains a tabulated statement showing when the allotments to various tribes were made, and in each, including 1917, it is stated that these allotments were made in 1891.

We cannot here cite the decisions of the Department holding to our view for they are not published and appear only in the files of the Indian office, but the writer of this brief is safe in saying that the Indian office, many times, prior to 1910, has stated the law to be just as we contend it to be. The question was constantly arising by direct inquiry and there was never any deviation from the rule. However, we have one example before us of great importance. It does not construe the Act of 1887 but it does construe another very similar provision. We quote the pertinent parts of the correspondence verbatim:

“Land

7556-1896 DEPARTMENT OF THE INTERIOR C.F.L.
Office of Indian Affairs

The Honorable

The Secretary of the Interior:

Sir: The third article of the agreement concluded with the Sac and Fox Nation of Indians, in Oklahoma, June 12, 1890, ratified and con-

firmed by the Act of February 13, 1891, (26 Stats. 749), contains the following stipulation:

‘It is further agreed that when the allotments to the citizens of the Sac and Fox Nation are made, the Secretary of the Interior shall cause patents to issue therefor in the names of the allottees which patent shall be of the legal effect and declare that eighty (80) acres of land to be designated and described by the allottee, his or her agent as above provided, at the time the allotment is being made, shall be held in trust by the United States of America for the period of twenty-five years, for the sole use and benefit of the allottee, or his or her heirs, according to the laws of the State or Territory where the land is located; and that the other eighty (80) acres shall be so held in trust by the United States of America for the period of five (5) years, or if the President of the United States will consent, for fifteen (15) years for like use and benefit; and at the expiration of said periods respectively the United States will convey the same by patent to said allottee or his or her heirs aforesaid, in fee discharged of said trust and free from all incumbrances * * *’

The allotments to the Sac and Fox Indians were approved by the Secretary of the Interior, September 4, 1891, and patents issued September 11, 1891.

The five-year trust period will therefore expire on the 3rd day of September next.”

The Commissioner then sets out the fact that the tribe had petitioned for an extension of the five-year periods to fifteen and that the agent likewise recommended compliance with the petitioners' request, and concludes as follows:

"I therefore have the honor to recommend that the President be asked to extend the trust period of five years in the allotments made to the Sac and Fox Indians for ten years, so that said period will expire on the 3rd day of September, 1906.

Very respectfully,

Your obedient servant,

D. M. Browning,

Commissioner."

(Allen) P.

The above letter appears to have been transmitted to the President by the Secretary of the Interior and we set out the Secretary's letter with all endorsements thereon in full:

"DEPARTMENT OF THE INTERIOR JTB

NCP

Washington, March 9, 1891.

The President:

In the inclosed letter dated the 4th instant the Commissioner of Indian Affairs states that the trust period named in certain patents issued for portions of the lands allotted to the Sac and Foxes of the Mississippi in Oklahoma, under the third article of the agreement with them of June 12, 1890, confirmed by the Act of Congress ap-

DEPARTMENT OF THE INTERIOR

August 25, 1906.

In accordance with the recommendation of the Commissioner of Indian Affairs this schedule is respectfully submitted to the President with the recommendation that he extend the trust period in each instance until and including September 3, 1916, as authorized by the Act of Congress approved June 21, 1906.

Thos. Ryan, Acting Secretary.

ESW

WHITE HOUSE, August 28, 1906.

By virtue of the authority conferred by the Act of Congress approved June 21, 1906, the trust period during which the lands described in the foregoing schedule are held in trust by the United States is hereby extended until and including September 3, 1916.

THEODORE ROOSEVELT."

The sole support for plaintiff's contention on this point, that is cited, is the opinion of the First Assistant Secretary of the Interior in 38 L. D. 559, 561, involving allotments made to Klamath Indians.

This decision was rendered in January, 1910, more than 23 years after the passage of the Act of 1887; so that it seems peculiar to urge it as authority for the proposition contended for. If the department had always held that the trust period began to run with the issuance of the trust patent it is not

clear why it should have to hold it anew. Moreover the opinion does not refer to any prior holding in harmony with the view now urged. It expressly refers to a prior decision to the contrary, and says that the rule in the former opinion was right and that the two cases are distinguished. And that is correct. The question in the *Klamath* case was whether the trust patent should be issued under the fifth section of the Act of 1887 or under the Act of May 8, 1906 (34 Stat. 182); while the question in the case mentioned in the *Klamath* decision, was when did the trust period begin to run where no patent was ever issued although one was contemplated and the Act was that of 1887. The Assistant Secretary uses the following language in closing the opinion cited by the Solicitor General:

“June 26, 1909, the department rendered decision in the matter of disposal of the residue lands of the Omaha Indians in Nebraska under the Special Acts of August 7, 1882 (22 Stat. 341) and March 3, 1893 (27 Stat. 612, 630). The first-named act provided, after individual allotments were completed and trust patents issued thereon, for issuance of trust patent to the tribe covering the residue lands in the same form prescribed by Section 5 of the General Act of 1887. Allotments were ‘to be made from such residue lands to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust

by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of the act touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein issued to the tribe in common.' The trust patent was not issued to the tribe at the time it was due but it was nevertheless held in said decision that the trust period expired twenty-five years from the date on which said patent became due." 38 L. D. 561.

The *Omaha* decision is not published and the *Klamath* decision is the only one that is, and it was rendered in 1910.

The slightest consideration of the *Klamath* case shows the real question was the time when citizenship should vest. If under the original Act of 1887 this would take place when trust patent issued, if under the Act of 1906 when the simple patent issued.

Wherefore, we think it only fair to conclude that the contemporaneous decisions of the department charged with the duty of administering the law, is in harmony with the rule announced by the Circuit Court of Appeals, and that its decision in the instant case was right.

II.

The trust period extends for twenty-five years from the certificate of allotment (trust patent) and until by execution of final patent the legal title in fee simple is vested in the Indian allottee or his heirs.

The respondent thinks the correct rule is that

The trust period began September 16, 1891, and expired September 16, 1916.

The Shawnees were allotted under an agreement. The pertinent part is to be found in a portion of article II reading as follows:

“Whereas, certain allotments of land have been heretofore made, and are now being made to said absentee Shawnees according to instructions from the Department of the Interior, at Washington, under Act of Congress entitled, ‘An Act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians and for other purposes,’ approved February 8, 1887, and according to said instructions, other allotments, are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, locations and area, as those heretofore made, and when made shall be confirmed, and approved by the Secretary of the

When said allotments shall be so confirmed

Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned Act of Congress." Act of March 3, 1891, (26 Stats. 1019.)

As stated, the contention in the court below centered on the proper construction to be given to the fifth section of the Act of 1887. It reads as follows:

"*Sec. 5.* That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

“Provided, that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided.” Act Feb. 8, 1887 (24 Stat. L. 388).

It is admitted in the bill and it is conceded by all parties that the Stella Washington allotment was approved on the 16th day of September, 1891, her name appearing on the schedule approved on that date. President HARRISON proclaimed to the world that she was so allotted in his proclamation opening the surplus lands to homestead entry dated September 18, 1891, in the following language:

*“Whereas, allotments of land in severalty to said Sac and Fox Nations, said Iowa Tribe, said Citizen Band of Pottawatomies, and the said Absentee Shawnee Indians have been made and approved, and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreement with them respectively, * * * ”* (27 Stat. 980-2.)

It is true that the provisional or trust patent did not actually issue until February 6, 1892, or perhaps more correctly speaking it was dated as of that date, but it is likewise true that Stella Washington's right to a preliminary patent vested on the instant her allotment was approved. Her equitable title was then

complete and did not depend upon the delivery of the trust patent.

—*Ballinger v. Frost*, 216 U. S. 240, 54 L. ed. 464.

By the very terms of the approval the patent was ordered issued positively and unequivocally. No reservation was made and no discretion was vested in any one after that, and the duty to issue thereupon became purely ministerial. Delay in issuing, or failure to issue such patent thereafter could not postpone or defeat the vesting of the equitable interest in Stella Washington, nor could it postpone the beginning of the trust period. Not only did the approval of the Secretary contain an absolute order for the issue; but the act itself is mandatory. It reads: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, *he shall cause* patents to issue therefor in the names of the allottees," etc. No discretion is lodged anywhere with regard to issuance of the trust patents.

It therefore follows that the trust began to run with the approval. However, it makes no difference whether we say the trust was created by the patent for it would relate back to the approval; but we hardly think it can be said that the trust is created by the patent for it might well be that the issue of a patent in a given case could be overlooked for

years, and this has actually occurred, and could it then be said that no trust was created because someone forgot to write out and record the patent?

The record shows and it is admitted by all parties that the allottee performed every condition, thing or act, provided for by the statute or within the purview thereof, and that, likewise, the United States, through its proper officers, has done every act with respect to this allotment that is provided for in any act applicable to the case, except to issue a fee simple patent, and there is no suggestion in the act, in the decisions of the Department, or in its custom or practice, to the effect that any discretion is lodged in the Executive Department, or any officer thereof, in the premises. Wherefore, Stella Washington obtained a vested interest in the land when her allotment was approved on September 16, 1891, and by operation of law the right to convey passed to her heirs on September 16, 1916.

—*Ballinger v. Frost*, 216 U. S. 241, 54 L. ed. 464;

✓ *Simmons v. Wagner*, 101 U. S. 260, 125 L. ed. 910;

Wood v. Gleason, 43 Okla. 9, 150 Pac. 418;

Godfrey v. Iowa Land & Trust Company,
21 Okla. 293, 91 Pac. 792.

III.

The Acts of Congress creating trust periods in like cases of conversion of Indian tribal lands into individual estates makes the period run from the date of certificate of allotment (trust patent) and not from the approval of the schedule of allotments. Unless the language in this act forbids a like construction the same period would be intended.

We apprehend the rule to be that Congress or any other legislative body expects the court to construe its acts in accordance with the plain unambiguous meaning of the words used in framing the same. The sum and substance of the petitioner's argument under this head is, that because Congress provided specifically in several acts that trust periods should run from the date of the allotment the same rule should be applied as to allotments under the Act of 1887, although it would be difficult to use language that would indicate any more clearly than the fifth section of said act shows it to be the intention of Congress that such period should begin from the approval of the allotment. Moreover, it is the universal rule, we think, of construction, that a patent or a certificate of allotment, when issued, relates back to the date when it was due to be issued, and that Congress in providing in several acts for a different rule, well understood the doctrine of relation. We

think the true rule is that whenever Congress intended that the trust period should begin to run from the date of patent it has never failed to say so. The Act of 1887 provides that upon the approval of the allotments the Secretary *shall*—not sometime afterwards—not when the clerks in the land office get time—or when it may be convenient—but *eo instante*, upon the approval. The agreement provides that when made they shall be confirmed and approved and the title shall be evidenced in the same manner—not that they will at some future time—not whenever the business of the land office will permit—or not that the title shall be evidenced if the Secretary directs the same to be done at some future date, but *when* the very moment, *eo instante*, the allotments are approved.

IV.

The President has the right to extend the trust period at any time until the United States has surrendered its trust by conveying the absolute fee simple title to the Indian allottee or to his heirs.

The petitioner argues that the effect of the act is to leave the title in the United States and the trust in existence until the fee simple patent is executed and title by it vested in the allottee or his heirs.

We are unable to comprehend this argument. The act in express terms limits the trust period to twenty-five years—from some time, at any rate, but petitioner contends that if the Executive Department should refuse to issue the fee simple patent, the trust period would continue forever. It cannot be denied that the argument of the petitioner is in effect that Congress did not mean to limit the trust period for twenty-five years, or, if it did, it failed to do so, for its argument is clear and the assertion is made that the trust period will continue from the date of the trust patent unto infinity, if in the meantime a fee simple patent is not issued. This argument and this proposition is answered so clearly and so fairly by the Acts of Congress that the mere statement of the proposition is, to our minds sufficient, to condemn it. *First*, the Act of 1887 provides for a twenty-five year period, not for an indefinite one; *second*, the same act provides that the President may extend—not an indefinite period—but the definite period of twenty-five years; *lastly*, the Act of 1906, expressly says that the power of extension shall be exercised prior to the expiration of the twenty-five year period. And again the fifth section of the Act of 1887 provides that conveyances only that are made during the twenty-five year period shall be void. Thus clearly indicating that conveyances made after that period are legal!

We are not unmindful of the fact that the Supreme Court has held that the legal title does not pass where the Act of Congress provides for the issuance of a patent to convey title to the land, but in the instant case it is unfair to say that no title was in the allottee upon the approval. He obtained something, and in addition the solemn covenant of the nation that when the twenty-five year period passed the whole title to the land should inure to him. Otherwise an immense fraud was practiced upon the wards of the nation by those purporting to serve them. And again, we are of the opinion that where the twenty-five year period expires and no final patent is issued the rule must be that the full equitable title passes at the expiration of the period, and nothing but the bare legal title remains in the United States. It has no power of disposition and can only convey said land to the allottee, and all the restrictions against conveyance on the part of the allottee having expired by operation of law, his deed is good.

Under this head the petitioner argues that Congress could by an act passed after the expiration of the trust, reimpose the same, and that this rule should be applied to the President where no intervening rights of third persons exist. We have always presumed that the President executed the law, and did not create it. Likewise we have assumed that Congress under the Constitution was given plenary pow-

er to control trade and intercourse with Indians, and have never before seen it suggested that the President is likewise endowed with the same authority. If the argument of the petitioner is correct an executive order is sufficient authority for any act that may be done with reference to Indian affairs and Congress usurps his prerogative when it makes laws concerning them.

V.

The executive order extending the time of the trust was definite and in accordance with the Act of Congress.

VI.

The order does not suspend the Act of Congress permitting sales before the expiration of the trust period upon the approval of the Secretary of the Interior.

From these statements we are compelled to dissent and will endeavor to show that instead of being definite it is exceedingly indefinite and moreover that it is not in accordance with the act, and does not even purport to cover the lands involved in this case.

The order purports to be under authority of the said fifth section and must be founded upon that, or the provision appearing in the Act of June 21, 1906, and in either event it is without effect because:

- (a) The order by its terms applies only to lands on which the trust expired in 1917, and
- (b) There is no intimation in the order that it was intended to cover inherited lands and Congress has clearly indicated by a long series of acts that as to such lands the trust period shall not be extended.

The language of the 5th section in respect to the power to enlarge the trust period is as follows :

“Provided, That the President of the United States may in any case extend the period.”

The only other act conferring any power on the President to extend the trust period reads as follows :

“Prior to the expiration of the trust period of any Indian allottee, to whom a trust or other patent, containing restrictions upon alienation, has been or shall be issued under any law or treaty, the President may in his discretion continue such restrictions on alienation for such period as he may deem best. Provided, however, that this shall not apply to lands in the Indian Territory.”

—Act of June 21, 1906 (34 Stat. L. 326).

These are the only provisions on the subject. The first says *extend* and the last says, *“Prior to the expiration of the trust period.”*

If the latter does not amend or affect the first it certainly makes clear the intention of Congress that any change in the trust period must be made before it expires. It is manifest that neither was intended to give authority to reimpose a trust.

We think we have conclusively shown that the trust began on September 16, 1891, and if so it ended September 16, 1916. For convenience we here set out the order in full, except the numbers and names of the Pottawatomies:

“It is hereby ordered, under authority contained in section 5 of the Act of February 8, 1887 (24 Stat. L. 388-389), that the trust periods on the allotments of the Absentee Shawnee and Citizen Pottawatomie Indians in Oklahoma, which trust expires during the calendar year, 1917, be, and is hereby, extended for a period of ten years from the dates of expiration, with the exception of the following:

Absentee Shawnee Tribe.

Allot.

No.

- | | |
|-----|--------------------------------------|
| 128 | Alford, Alaric |
| 3 | Alford, Charles R. |
| 1 | Alford, Thomas W. |
| 7 | Beaver, Addie |
| 331 | Day, George |
| 262 | Ellis, Willie |
| 362 | Fox, Clarence, or Tah-wah-pea-sca-ca |
| 514 | Ellis, Lucinda, or Nay-co-twa-pea-se |

- 148 Hodjo, Billy
- 52 Than-ah-pea-se, now Morton, Mary
- 186 Panther, Lilly
- 496 Sloan, Victor
- 251 Switch, James
- 355 Thorp, Frank

Citizen Pottawatomie Tribe

* * * * *

The White House,
24 November, 1916, WOODROW WILSON
No. 2494."

This order is in express terms limited to those allotments on "which the trust expires during the calendar year 1917." The trust period as to the land in controversy here expired in 1916. Wherefore this order cannot be held to apply.

The identity of the lands intended to be covered by the order cannot be determined from it. It merely says in a sort of a negative way that the allotments of the Shawnees shall be held in trust for an additional ten years except those owned by certain persons therein named. It surely cannot be construed to cover all the lands so allotted except those identified in the order by the names of the owners, all of whom were then living, because a great part of said lands had long since passed by approved departmental deeds. Moreover other allotments had descended to persons who had been pronounced com-

petent by the Secretary under the Act of May 3, 1906 (34 Stat. 182), and in many instances to persons whose land had been freed of any governmental control. Both of these conditions exist in the case at bar. Mary, Willie and Walter Washington, sister and brothers of the half-blood to Stella Washington, were allotted as Creek quarter bloods, and their lands were, and are, totally free from any restriction whatsoever. While James, another half brother, received a patent in fee to his allotment as a Shawnee, because the Secretary found him competent. These facts do not appear from the record and we only suggest them because it is not an unusual condition, and one of which the Department is fully aware. Moreover the record does show that Stella herself was adjudged competent and received a patent for one-half of her allotment (see exhibit to petitioner's brief in support of the petition for *certiorari*).

So we think it only reasonable to conclude that the order was drawn with these not uncommon and natural conditions in mind and therefore it intended to extend the period as to the lands of the allottees only then alive and not as to allotments acquired by inheritance. We can conceive of no other reasonable construction.

Very soon after Stella Washington was allotted Congress clearly indicated that it intended that the

trust period as to absentee Shawnee allotments should be terminated before the 25-year period expired. In 1894, less than three years after allotment, there was incorporated in the Indian appropriation bill the following proviso:

“Provided, that any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the act approved February eighth, eighteen hundred and eighty-seven (twenty-fourth statutes, three hundred and eighty-eight), and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another state or territory, may in like manner sell and convey all the land covered by said patent, and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named.”

This provision was extended and broadened by the Act of May 31, 1900 (31 Stat. L. 221), section seven thereof reading as follows:

“That the proviso to the act approved August fifteenth, eighteen hundred and ninety-four,

permitting the sale of allotted lands by members of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma is hereby extended so as to permit *the adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent; and if there be both adult and minor owners of such inherited lands then such minors may join in a sale thereof by a guardian, duly appointed by the proper court, upon an order of such court made upon petition filed by such guardian, all conveyances made under this provision to be subject to the approval of the Secretary of the Interior; and any Citizen Pottawatomie or Absentee Shawnee not residing upon his allotment, but being an actual resident of another state or territory, may in like manner sell and convey all the land allotted to him.*"

And indeed, a short time thereafter Congress reversed its policy with respect to all allotments where the same were inherited, by enacting a general provision applicable to all trust lands wherever situated.

Section 7, of the Act of May 27, 1902, reads :

"That the adult heirs of any deceased Indian, to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by

the proper court upon the order of such court, made upon petition filed by such guardian, but all such conveyances shall be subject to approval by the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee." (32 Stat. L. 245-275.)

The next enactment is not applicable to this case but as it is an amendment to the Act of 1887, it clearly shows the congressional intent as to inherited lands. The last paragraph of the Act of May 8, 1906, reads as follows:

"That hereafter when an allotment of land is made to any Indian and any such Indian dies before the expiration of the trust period, said allotment shall be canceled and the land shall revert to the United States and the Secretary of the Interior *shall* ascertain the legal heirs of such Indian and *shall* cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers and pay the net proceeds to the heirs," etc. (34 Stat. 183.)

Likewise the Act of May 29, 1908, does not apply to this particular allotment but the policy of Congress looms clearly on reading this part thereof:

! "That when an Indian who has heretofore

received or who may hereafter receive, an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs *shall* cause to be issued in their names a patent in fee simple for said lands, but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided," etc.

The Act of June 25, 1910 (36 Stat. L. 855), does apply and practically reiterates the provision of the Act of May 29, 1908 (*supra*), and the Act of May 18, 1916 (38 Stat. . . .), authorizing partition of inherited lands, whether the heirs are competent or not, repeats the same provision as to competents and authorizes the issuance of trust patents to the incompetents but expressly limits the trust period to expire in accordance with the original trust period, meaning twenty-five years from the date of the beginning of the original period.

These acts show clearly, that Congress first withdrew from the President the power to enlarge the trust period as to lands inherited from allottees as expressed in the 5th section whereby an extension was possible in any case, by providing for sale, etc.; and, finally to make the purpose clear enacted the provision appearing in the Act of June 21, 1906, *supra*, which specifically limits this power to be ex-

exercised "prior to the expiration of the trust period." If this act amends the provision appearing in the Act of 1887 then there can be no question about this case.

At any rate it is clear from a perusal of these acts that it is the intention of Congress, and therefore the policy of the Government, to end the trust period upon all allotments prior to the date fixed by the allotment acts, upon the death of the allottee, either by patent or by sale. True, a conveyance by such heirs, before the expiration of the trust, would not convey title until approved by the Secretary of the Interior; but it is certainly true that the Secretary's approval goes merely to the adequacy of the consideration and he has no authority to arbitrarily withhold his approval when such heirs seek to convey. If he has such power the effect would be that instead of authorizing the heirs to convey, the Secretary is authorized to convey, and this cannot be the law.

Conclusion.

We have attempted to show, and we think we have shown beyond peradventure that the trust period began to run on September 16, 1891, and that it expired September 16, 1916, so that from that date there was no express trust in existence unless it was reimposed by the presidential order of November 24,

1916. We think, likewise, that we have established the futility of that order beyond peradventure. But it is argued that the title was in the United States during the trust and that the fee was to be conveyed by patent and this not having been done the fee remained in the United States and hence no title could be conveyed by the allottee. Those urging this theory are extremely careful to refrain from expressing an opinion as to what the allottee has in the way of estate in the land after the expiration of the period. There are obviously but two answers either of which damns the theory beyond redemption. It is clear the trust was a covenant to stand seized to the use of the Indian for 25 years. At the end of that time this ceases, and the Indian loses the benefit conferred, loses every vestige of right, title, or interest, or he acquires the full equitable title with full power to convey. If the first, the title cannot vest in him again until Congress acts because the Executive Department of the Government, cannot convey away public land except in obedience to a plain mandate of Congress expressed in an Act of Congress. So if the title does not pass automatically with the expiration of the trust period it can never pass until Congress acts, and the Indian has absolutely less at the end of his probationary period than before. He loses the use, the title remains in the Government freed from the trust and the allottee

has absolutely nothing. This is the only deduction that can be drawn from the non-executing theory. In all moderation it is unreasonable, if not absurd.

If the full equitable title only passed, and not the fee, automatically, with the termination of the trust, then, of course, the allottee has the right to convey and his deed is good. But we think that the Act of 1887 in its own terms answers every question and provides that the title passed automatically and a conveyance by the allottee or his heirs after the termination of the trust is valid.

The covenant of title or interest is expressed in the 5th section of the Act of 1887 in this wise:

“ * * * that the United States does and will hold the lands thus allotted for the *period* of twenty-five years, in trust for the sole use and benefit of the Indian,” etc. * * * “and that at the expiration of the said *period* the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee,” etc.

If the act stopped at this there might be some ground for argument that until the fee patent issued the title remained in the United States and of course a conveyance thereof could not be made because the language might be construed to mean the title did not pass except by the patent. This construction, however, would destroy that maxim of equity on which the entire doctrine of trusts may be

an indeterminate status in the interim pending the issuance of the trust patent; and, where are the provisions to cover the manifest contingencies that would arise thereunder; and what was the purpose of Congress in leaving so important a matter to the efficiency or inefficiency of departmental clerks who might issue a patent in time or might delay its issuance negligently or intentionally ten, fifteen or twenty years? Why should Congress vest in the President the power to extend such period if a Governmental department or its clerks were delegated power arbitrarily, absolutely, and irremediably, to extend it indefinitely by neglecting or refusing to issue patent?

Congress also intended that title in fee simple should vest at the expiration of said period, and not presuming negligence or delay, presumed that patents in fee would promptly issue as of the date of said expiration. If not, what did Congress intend to do with such lands at the expiration of the trust? Seize them and open them to homestead entry or what? If not, for what purpose did Congress create an indeterminate estate in the interim between the expiration of the trust period and the issuance of the patent in fee that might be continued five, ten, fifteen years or indefinitely through departmental inefficiency? Where has Congress enacted that the trust period should be twenty-five years, provided

however said period may be increased indefinitely at either end by the failure or neglect to issue the trust patent in the beginning or the patent in fee at the end? Why did Congress make no provision for the manifest perplexities and dilemmas that might thus arise? Why, in dealing with Indians, did it create and impose a maze of intricacies and difficulties?

To a mind unbiased by the zeal of argument and unconfused by "wise saws and modern instances," and neglecting those details and those side-lights which seem to the defendant to make his position impregnable, it would seem that these questions alone are susceptible of no reasonable answer, and the solution of the questions presented by the Circuit Court of Appeals is correct and the decision should be affirmed.

Respectfully submitted,

MARK GOODE,

HAL JOHNSON,

JESSE D. LYDICK,

Solicitors for the Respondent.